(6)

No. 88-1916

IN THE

Supreme Court of the United States

October Term, 1989

STATE OF MINNESOTA,

Petitioner,

vs.

ROBERT DARREN OLSON,

Respondent.

ON WRIT OF CERTIORARI TO THE
MINNESOTA SUPREME COURT

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

1. After successfully eluding the police following an armed robbery and murder, defendant sleeps overnight on the floor at a friend's home. He has no key to the home, is never left alone there and has no possessions other than a few extra clothes in a bag. Does defendant have a legitimate expectation of privacy in the friend's home to enable him to challenge his warrantless arrest there under the Fourth and Fourteenth Amendments to the United States Constitution?

2. At 2:00 p.m. on a Sunday the police establish probable cause to believe defendant is an accomplice in an aggravated robbery and murder that occurred the day before. Police also have reason to believe that defendant is temporarily staying in a particular duplex; that he may be armed; and that he may be preparing to flee. Approximately an hour later, when police learn that defendant and his friends are present at that address, they surround the duplex. They telephone into the duplex and confirm defendant's presence and his refusal to come out. Under these circumstances, must police continue to stake out the building while obtaining a warrant, or is an immediate warrantless entry to arrest justified by exigent circumstances under the Fourth and Fourteenth Amendments to the United States Constitution?

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OPINIONS BELOW

The opinion of the Minnesota Supreme Court (J.A.14-27) is reported at 436 N.W.2d 92 (Minn. 1989). The opinion of the Hennepin County District Court (J.A.3-13) is unreported.

JURISDICTION

The judgment of the Minnesota Supreme Court was entered on February 24, 1989. The State filed a timely Petition for Rehearing on March 6, 1989. The Minnesota Supreme Court's summary denial of that Petition for Rehearing (J.A.27) was filed on March 28, 1989. The petition for a writ of certiorari was filed within sixty days of the court's denial of rehearing, and was granted on October 2, 1989.

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a) (1989).

CONSTITUTIONAL PROVISIONS

The Fourth Amendment to the United States Constitution:

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Due Process Clause of the Fourteenth Amendment to the United States Constitution:

. . . [N]or shall any State deprive any person of life, liberty, or property, without due process of law . . ."

STATEMENT OF THE CASE

On Saturday morning, July 18, 1987 a lone gunman entered a gas station in Minneapolis with an automatic weapon. Without a word, the man shot the young manager of the store in the back of the head. Then he robbed the other three employees of the station at gunpoint. Police were quickly alerted. Because the description of the robber fit Joseph Ecker, a man suspected of committing several robberies in the area, police officers went to Ecker's home within minutes of the robbery/murder. A brown Oldsmobile pulled up at Ecker's home at the same time as the police car. When the driver saw the squad car, he put his car in reverse and sped backwards; the car spun out of control and came to a stop. The driver and one other male jumped out of the car and fled on foot. Officers gave chase and quickly arrested Joseph Ecker, the passenger of the car, inside his home. The other man escaped. Ecker was later identified as the gunman who entered the station to commit the crime.

Inside the abandoned Oldsmobile police found the stolen money and the murder weapon, as well as various documents linking Respondent Robert Darren Olson to the car. They also found in the car a pellet gun in the shape of a revolver, a knife, a knife sheath and two empty shoulder holsters for handguns (R.85, 99; T.224, 341, 345, 369-70).[1]

Police continued to investigate. On the morning of the next day, Sunday, police received a tip that a man named "Rob" was the driver of the getaway car and was planning to leave town by bus (R.110-12, 129). Police officers were dispatched to the bus depot (R.129-130). At noon the tipster called again. She identified herself[2] to Sgt. DeConcini, the investigating officer, and told him that "Maria," who lived on Garfield Avenue N.E., had told her that "Rob" had admitted to her (Maria) and to "Louann and Julie" at 2406 Fillmore Avenue N.E. that he was the driver for the gas station robbery and murder (R.113-14, 122). Police officers went to 2406 Fillmore, a duplex, to try to verify the tip (R.114, 132, 148-50). They were unable to find Louann or Julie, but the person living in the lower portion of the duplex identified herself as Louann's mother and verified that Louann and Julie Bergstrom lived upstairs. She told police that Respondent had been staying with Louann and Julie for a day or so, but that they were not home now. She agreed to call police when they returned (R.114-15, 132-33, 142-44, 147, 148-50).

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[1] "R" refers to the transcript of the pretrial suppression hearing. This hearing is referred to as a "Rasmussen" hearing because it is mandated in Minnesota by *State ex rel. Rasmussen v. Tahash*, 272 Minn. 539, 141 N.W.2d 3 (1965). "T" refers to the trial transcript.

[2] The actual identity of the informant is unknown. The woman identified herself as "Diana Murphy" and gave an address and telephone number (R.113). A woman named Diana Humphrey, whose address and telephone number matched that given by the tipster, testified that she knew Louann and Julie but that she did not call the police (R.168-176).

At 2:00 p.m., shortly after he received this information, Sgt. DeConcini issued a "pickup order" for Respondent (R.115-117, 131; T.430). He did not attempt to get an arrest warrant (R.129).[3] He instructed his officers to stay away from the duplex until he received a call that Respondent had returned. At approximately 2:45 p.m. the downstairs resident called and told DeConcini that Respondent and the others had returned (R.117-18). DeConcini ordered his officers to surround the home. After they arrived, but before they tried to enter, DeConcini called the home. A woman who identified herself as "Julie" answered the telephone. DeConcini told her to tell Respondent to come out of the house, that police were waiting for him. There was a pause, and then DeConcini heard a male voice in the background saying, "tell them I left." Julie then came back on the phone and said "[Respondent] has left already" (R.118, 124; T.431, 433-34). DeConcini then directed the officers to enter the house.[4] They found

[3] Rules 2 and 3 of the Minnesota Rules of Criminal Procedure provide that an arrest warrant must be combined with a criminal complaint, which requires a county attorney's signature as well as judicial approval. 49 Minn.Stat.Ann.R.Cr.P. 2, 3. Sgt. DeConcini testified he did not attempt to obtain a warrant because it was Sunday, the county attorney's office was not open, and the tip gave him reason to believe that Respondent intended to flee (R.116, 129). He stated he did not know how long it would take to obtain an arrest warrant/complaint on Sunday in Hennepin County because he had never tried to obtain one on a weekend (R.130).

[4] There is no dispute that Louann Bergstrom opened the door in response to the officers' knock, and the police entered with guns drawn (R.184-85). In his Brief in Opposition to Petition for Certiorari Respondent characterized the police entry as a "storming of a dwelling" and quoted portions of Julie Bergstrom's testimony at the pretrial hearing in which she claimed to have been mistreated by police. Her testimony, however, was not supported by that of her mother, Julie's boyfriend or the police officers, and the trial court did not make such a finding of excessive force or mistreatment (*See* R.137-38, 145-46, 182-192, 208-211 and J.A.3-6).

Respondent hiding behind furniture and toys in the back of a small closet on the third floor attic of the building (R.118, 139-41; T.408-411). He was then arrested, and shortly after 3:00 p.m. police obtained a statement from him, in which he admitted driving Ecker to and from the crime scene but denied any involvement in the crime (R.157-163; T.379-396).[5]

In August 1987 Respondent and Joseph Ecker were indicted by a Hennepin County, Minnesota grand jury on charges of first degree premeditated murder, first degree felony murder, aggravated robbery and second degree assault.[6]

At a pretrial hearing Respondent moved to suppress his post arrest statement on the grounds that his warrantless arrest violated the Fourth and Fourteenth Amendments of the United States Constitution. Respondent argued that he had a legitimate expectation of privacy in the Bergstrom duplex and therefore the warrantless police entry to arrest him violated

[5] Subsequent police investigation revealed that the car used in the crime belonged to Respondent and that the murder weapon probably also belonged to Respondent (T.390, 475-500, 507-08).

[6] Minnesota Statutes §609.185 (1987) provided in relevant part:

> Whoever does any of the following is guilty of murder in the first degree and shall be sentenced to imprisonment for life:
>
> (1) causes the death of a human being with premeditation and with intent to effect the death of the person or of another;
>
> • • •
>
> (3) causes the death of a human being with intent to effect the death of the person or another, while committing or attempting to commit . . . aggravated robbery, ...

Minnesota Statutes §609.245 (1987) provided as follows:

> Whoever, while committing a robbery, is armed with a dangerous weapon or inflicts bodily harm upon another is guilty of aggravated robbery and may be sentenced to imprisonment for not more than 20 years or to payment of a fine of not more than $35,000 or both.

Minnesota Statutes §609.222 (1987) provides as follows:

> Whoever assaults another with a dangerous weapon may be sentenced to imprisonment for not more than five years or to payment of a fine of not more than $10,000, or both.

the principles set forth in *Payton v. New York*, 445 U.S. 573 (1980).[7] The State argued in response that Respondent lacked the necessary "standing" to contest the legality of his arrest and that in any event exigent circumstances justified the warrantless arrest.

Testimony presented at the hearing revealed the following facts with respect to Respondent's connection with the duplex: Respondent had been staying with Ecker at Ecker's home for at least ten days before the crime; after Respondent's narrow escape from police which resulted in Ecker's arrest in his home, Respondent did not wish to return there (R.220-21). Although they had not known him long, Julie Bergstrom and her mother, Louann, agreed to allow Respondent to stay with them for a day or two in their upper duplex (R.182, 184, 194-95, 198, 216). At the time of his arrest Respondent had slept on the floor for one night; also sharing the home that night was Julie's boyfriend (R.182, 189, 191, 208-09). Respondent had no legal interest in the duplex, did not receive mail there and did not have a key (R.220). Although he kept a few extra clothes in a bag at the home, he had no closet, dresser, or even a toothbrush, at the duplex (R.220). Julie Bergstrom testified that Respondent was free to come and go; however, during his overnight stay Respondent left the duplex when the other occupants left and returned only when the other occupants returned (R.183-84, 195, 216-17). The only evidence concerning

[7] Respondent also claimed that to the extent the police relied on information from a "fictitious informant," they lacked sufficient probable cause to arrest under the Fourth and Fourteenth Amendments to the United States Constitution. The trial court found that the information provided by the informant was sufficiently corroborated to justify police reliance, and that the tip, as well as the other incriminating evidence found in the getaway car, provided sufficient probable cause for Respondent's arrest (J.A.6, 9-12). On appeal the Minnesota Supreme Court discussed, but did not reach, the issue of probable cause to arrest (J.A.17-20).

Respondent's right to allow or refuse entry to visitors was as follows:

> Q. [by defense attorney]: And if somebody came over to see Mr. Olson, did he have your permission to admit them or refuse to admit them?
>
> A. [by Louann Bergstrom]: I don't know. It was never discussed.
>
> Q. Had somebody come over to visit Mr. Olson, would you have allowed him to decide if that person would visit with him?
>
> A. If I saw no reason not to.

(R.192). Although Respondent testified he would have given friends who wished to reach him the Bergstroms' address and phone number, there was no evidence that Respondent in fact did so or received any visitors during his brief stay at the Bergstroms (R.218, 225-26).

The trial court denied Respondent's motion to suppress, finding that under these facts, Respondent had no reasonable expectation of privacy in the duplex and thus had no "standing" to contest his arrest. The court did not therefore reach the issue of whether exigent circumstances justified the warrantless arrest (J.A.6-9).

On February 11, 1988, after a jury trial, Respondent was convicted as Ecker's accomplice of first degree felony murder, aggravated robbery and second degree assault. Respondent appealed his conviction to the Minnesota Supreme Court, alleging numerous errors, including the legality of his warrantless arrest. On February 24, 1989, the Minnesota Supreme Court, reaching only the issues of the legality of Respondent's warrantless arrest and his "standing" to raise the issue, reversed Respondent's conviction and remanded the case for a

new trial (J.A.14-27). The court held that as an overnight guest with permission to stay for an indefinite period and some authority to allow or refuse visitors entry, Respondent had a legitimate expectation of privacy in the duplex (J.A.20-22).[8]

The Minnesota Supreme Court then decided that the warrantless arrest was not justified by exigent circumstances because: a) Respondent was not the murderer but rather his accomplice; b) the police had no reason to believe Respondent was armed since they had already recovered the murder weapon; c) Respondent had not yet left town; and d) the police should have obtained a warrant, either during the hour while they waited for Respondent's return to the duplex or while they had the house surrounded (J.A.22-25). Because the court held that the arrest violated Respondent's federal Fourth Amendment rights, it suppressed Respondent's post arrest statement. The court found that the use of the statement at trial was not harmless error and remanded the case for a new trial (J.A.25-27). The State filed a timely Petition for Rehearing on March 6, 1989, which was summarily denied by the Minnesota Supreme Court on March 28, 1989 (J.A.27). Certiorari was granted by this Court on October 2, 1989.

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[8] Respondent has consistently argued that he had the authority to admit or refuse others entry; the State has consistently argued that the record does not support such a conclusion. The trial court did not explicitly find lack of authority to control, but such a finding is implicit in the trial court's order. The Minnesota Supreme Court implicitly held that the trial court's finding on this issue was clearly erroneous.

SUMMARY OF ARGUMENT

A. Legitimate Expectation of Privacy

It is well-settled that one cannot assert the Fourth Amendment privacy rights of another. *Alderman v. United States*, 394 U.S. 165 (1969). Respondent, therefore, as the proponent of a motion to suppress, has the burden of establishing not only that his arrest was illegal but also that he had a legitimate expectation of privacy in the home in which he was arrested. *Rawlings v. Kentucky*, 448 U.S. 98, 104 (1980).

The Minnesota Supreme Court held that Respondent, who was arrested after sleeping overnight in the home of an acquaintance, had a legitimate expectation of privacy in that home. The court came to that conclusion despite the existence of the following facts: 1) up until the night before his arrest Respondent had been living with his codefendant; 2) Respondent did not own or rent the home in which he was arrested and had no key; 3) Respondent kept no possessions there other than a change of clothes—not even a toothbrush; and 4) Respondent was never left alone there and had no clear authority to admit or refuse visitors. Because any right to privacy that Respondent could possess in the home could be derived only from his sleeping on the floor there one night with permission of the owners, the Minnesota Supreme Court's implicit holding is that Respondent's status as an overnight guest is alone sufficient to demonstrate a privacy interest in a third person's home. That holding conflicts with *Jones v. United States*, 362 U.S. 257 (1960), as interpreted by *Rakas v. Illinois*, 439 U.S. 128 (1978). *Jones* held that anyone "legitimately on the premises" where a search occurs has "standing" to challenge the legality of the search. In *Rakas* the Court rejected that language in *Jones*, but reaffirmed the *Jones* result, emphasizing

that the defendant in *Jones* had a privacy interest in his friend's apartment because, in addition to his legitimate presence, he had complete control over it and could exclude others from it. Since Respondent had no control and no right to exclude in his friend's home, the Minnesota Supreme Court's holding that he nevertheless had a privacy interest there is merely a restatement of the "legitimately on the premises" standard which this Court rejected in *Rakas*.

Moreover, any subjective privacy expectations held by Respondent under the facts of this case were not reasonable. This case raises the question of what facts must be present before society can reasonably find privacy expectations in a second place similar to those in one's own home. The State suggests twelve factors which reflect society's understanding of what makes a dwelling, even a temporary one, a "home." These factors reflect society's view that merely sleeping overnight in a place does not create privacy expectations: one must establish ownership or a relationship to the owner; extensive use; or some evidence of control over the premises before a reasonable expectation of privacy will be found.

The practical effect of the Minnesota court's holding is to greatly enlarge the class of persons who may invoke the exclusionary rule. There is, however, a substantial social cost to the invocation of the rule. By allowing felons to use the Fourth Amendment as a shield to escape apprehension wherever they flee, the Minnesota court's holding drastically shifts the vital and delicate balance between privacy rights and effective law enforcement.

B. Exigent Circumstances

Warrantless searches and seizures within the home are unreasonable under the Fourth Amendment unless exigent circumstances create a compelling need for official action and no time to secure a warrant. *Payton v. New York*, 445 U.S. 573 (1980); *Michigan v. Tyler*, 436 U.S. 499 (1978). The State contends that where, as in this case, police have probable cause to believe a suspect committed a felony and that the suspect will be located in a particular home, they can arrest the suspect there without a warrant if a delay to get a warrant will gravely endanger police officers or others and will result in the escape of the suspect. If arrest were delayed, a violent felon could destroy evidence, go into hiding, commit more crimes, or harm police officers or others. Delay may well allow the felon to contemplate and prepare an armed confrontation with police or the taking of a hostage. The Fourth Amendment does not require police officers to delay if to do so would gravely endanger their lives or the lives of others. *Warden v. Hayden*, 387 U.S. 294, 298-99 (1967).

The police officer's decision to make a warrantless arrest was reasonable in this case because: 1) police had probable cause to believe that Respondent had participated in a violent felony which involved a firearm; 2) police believed Respondent might be armed; 3) Respondent was in hiding and police had received a tip that he was preparing to flee; 4) police had probable cause to believe Respondent was in the duplex; and 5) an arrest warrant/complaint required locating a county attorney, a secretary, and a judge on a Sunday afternoon, a process which could not have been accomplished quickly, and certainly not before Respondent returned to the duplex.

In addition, application of the exigent circumstances test described in *Dorman v. United States*, 435 F.2d 385, 392-93

(D.C. Cir. 1970) compels a finding of exigent circumstances in this case. Because the *Dorman* rule, however, is difficult for police officers to apply in the field, it should be rejected by this Court in favor of a simpler rule. The *Dorman* rule can be distilled to its essentials: an exigency exists when police have probable cause, knowledge of the suspect's whereabouts, and facts indicating that the suspect is dangerous and about to flee. This distillation, involving judgments that police officers are forced to make daily, can be more quickly and consistently applied by police officers than the original rule.

The exigency justifying Respondent's warrantless arrest was not destroyed by the officers' presumed ability to stake out the duplex while obtaining a warrant. The Minnesota court's holding to the contrary ignores the fact that to maintain surveillance of the "hideout" of a violent felon is extremely dangerous to the police, to the defendant, to the other occupants of the house, and to the public at large. Furthermore, stakeouts are not always effective in preventing escape. The Minnesota court's conclusion that a stakeout was required in this case because Respondent's arrest was "planned" is erroneous. Far from truly "planned," Respondent's arrest was the culmination of an ongoing, continuous field investigation. When police obtained both probable cause and knowledge of Respondent's possible location, they acted immediately to arrest because they believed they were faced with an emergency situation. Moreover, even if exigent circumstances did not exist before police went to the duplex to arrest Respondent, an exigency arose after they arrived, when a telephone call into the duplex suggested that Respondent intended to flee at that moment. *See Cardwell v. Lewis*, 417 U.S. 583, 595-96 (1974) (An exigency requiring police action may arise at any time after probable cause is established.).

ARGUMENT

I. RESPONDENT HAD NO LEGITIMATE EXPECTATION OF PRIVACY IN THE HOME IN WHICH HE WAS ARRESTED AND THEREFORE CANNOT SEEK TO SUPPRESS EVIDENCE OBTAINED AS A RESULT OF HIS WARRANTLESS ARREST.

This case presents the question of under what circumstances an overnight guest in a third person's home has a legitimate expectation of privacy in that home under the Fourth Amendment. The Minnesota Supreme Court held, in essence, that an overnight visitor staying for an indefinite period with permission of the owners has a legitimate privacy interest in that home. The practical effect of the Minnesota court's holding is to greatly enlarge the class of persons who may invoke the exclusionary rule, drastically shifting the delicate balance between privacy rights and effective law enforcement that this Court has attempted to strike over the years. Moreover, the court's holding contradicts the common sense understanding of "home" that citizens and police officers alike share.

Felons sought by the police frequently do not return to their homes, but stay briefly with a succession of friends or acquaintances to elude police. Under the Minnesota court's holding in this case, wherever a felon hides out overnight, however briefly, is his "home" for Fourth Amendment purposes, as long as he has permission to be there. But the Fourth Amendment was not designed to provide sanctuary for citizens wherever they are; it was intended to protect privacy in one's home. Merely sleeping in a place for one night does not make it one's home. *See* pp. 19-22, *infra*. That Respondent was arrested in someone's home is less important, for the purposes of the

Fourth Amendment, than the extent of Respondent's actual privacy interests in that place. *See Katz v. United States*, 389 U.S. 347, 351 (1967) ("The Fourth Amendment protects people, not places."). Under the facts of this case, it was no more an invasion of *Respondent's* privacy rights to arrest him in the Bergstroms' home than it would have been to arrest him at a park bench or in an office building where he had slept the night. If the police violated anyone's privacy rights by entering the Bergstroms' home, they violated the Bergstroms' rights. To broaden Fourth Amendment protection to persons like Respondent who have such a tenuous connection to a place is to virtually eliminate the "standing" requirement.

A. Respondent Can Invoke the Exclusionary Rule Only If He Establishes that the Warrantless Entry Into the Duplex to Arrest Him Violated His Own Privacy Interests.

The essential purpose of the Fourth Amendment is to shield the citizen from unwarranted intrusions into his privacy. Freedom from intrusion into the home is the archetype of the privacy protection secured by the Fourth Amendment. *Payton v. New York*, 445 U.S. 573, 587, 588 n.26, 590 (1980). The principal method developed by the Court to protect Fourth Amendment rights is the exclusionary rule. The rule deters future arbitrary government intrusions of privacy by preventing the government from using the fruits of its illegal conduct against the person whose rights it violated.

The exclusionary rule, however, while protecting Fourth Amendment rights, also has a counterbalancing social cost: when it is applied, "relevant and reliable evidence is kept from the trier of fact and the search for truth at trial is deflected." *Rakas v. Illinois*, 439 U.S. 128, 137 (1978). This results in some guilty persons going free, causing public outrage and

distrust of the criminal justice system. Because of this substantial social cost, there must be limits on the invocation of the rule; the individual's constitutionally protected interest in privacy must be balanced with the public interest in effective law enforcement. *O'Connor v. Ortega*, 480 U.S. 709, 719-20 (1987). One way of striking this balance is the well-settled principle that one cannot assert the Fourth Amendment privacy rights of another. As the court explained in *Alderman v. United States*, 394 U.S. 165, 174-75 (1969):

> There is no necessity to exclude evidence against one defendant in order to protect the rights of another. No rights of the victim of an illegal search are at stake when the evidence is offered against some other party. The victim can and very probably will object for himself when and if it becomes important for him to do so . . . The deterrent values of preventing the incrimination of those whose rights the police have violated have been considered sufficient to justify the suppression of probative evidence even though the case against the defendant is weakened or destroyed . . . But we are not convinced that the additional benefits of extending the exclusionary rule to other defendants would justify further encroachment upon public interest in prosecuting those accused of crime and having them acquitted or convicted on the basis of all the evidence which exposes the truth.

The proponent of a motion to suppress, therefore, has the burden of establishing that his own Fourth Amendment rights were violated by the challenged search or seizure. *Rawlings v. Kentucky*, 448 U.S. 98, 104-05 (1980); *Rakas v. Illinois*, 439 U.S. 128, 130-31, n.1 (1978). Respondent must demonstrate not only that the arrest was illegal but also that he had a "legitimate expectation of privacy" in the upper duplex in

which he was arrested. *United States v. Salvucci*, 448 U.S. 83, 92 (1980); *Rawlings v. Kentucky*, 448 U.S. at 104.[9]

B. Respondent Did not Overcome his Burden of Demonstrating a Legitimate Expectation of Privacy in the Duplex in Which He was Arrested.

1. Respondent has no legitimate expectation of privacy under prior decisions of this court.

The record establishes that Respondent did not own or rent the duplex. He was not related to its owners. He did not possess a key. He did not receive mail or visitors there. He had never used the premises before. He kept no possessions there other than a change of clothes. He was never left alone in the duplex. His authority to admit or refuse visitors was never discussed or tested. Any right to privacy that Respondent could possess in the duplex could be derived only from his sleeping on the floor there one night with permission of the owners. Although some lower courts hold, at least implicitly, that a defendant's status as an overnight guest is alone sufficient to demonstrate a privacy interest in a third person's home,[10] prior decisions by this Court compel a different result.

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[9] Whether or not the police conduct in this case was outrageous pertains to the issue of the legality of the arrest and not to the "standing" issue. *See Rawlings v. Kentucky*, 448 U.S. at 112 (Blackmun, J., concurring). ("It remains possible for a defendant to prove that his legitimate interest of privacy was invaded, and yet fail to prove that the police acted illegally in doing so. And it is equally possible for a defendant to prove that the police acted illegally, and yet fail to prove that his own privacy interest was affected.").

[10] *See United States v. McIntosh*, 857 F.2d 466 (8th Cir. 1988); *United States v. Echegoyen*, 799 F.2d 1271 (9th Cir. 1986); *United States v. Underwood*, 717 F.2d 482 (9th Cir. 1983), *cert. denied*, 465 U.S. 1036 (1984). *See also State v. Elderts*, 62 Hawaii 495, 617 P.2d 89 (1980) (Since defendant was given permission by tenant to enter apartment, defendant had reasonable expectation of privacy there.).

In *Jones v. United States*, 362 U.S. 257 (1960) this Court held that anyone legitimately on the premises where a search occurs has "standing" to challenge the legality of the search. This Court significantly narrowed the *Jones* holding, however, in *Rakas v. Illinois*, 439 U.S. 128 (1978):

> We think that *Jones* on its facts merely stands for the unremarkable proposition that a person can have a legally sufficient interest in a place other than his own home so that the Fourth Amendment protects him from unreasonable governmental intrusion into that place.

439 U.S. at 142. The Court held that the correct inquiry was whether the challenger has a legitimate expectation of privacy in the area invaded. The Court nevertheless affirmed the *Jones* result, holding that Jones did have a legitimate expectation of privacy in the apartment searched. Crucial to that decision was the fact that the owner of the apartment was away and that Jones had a key to the apartment. He could therefore come and go at will, and freely admit and exclude others: "Jones had complete dominion and control over the apartment and could exclude others from it." *Rakas*, 439 U.S. at 149.[11]

In holding that Respondent had a legitimate expectation of privacy in the duplex, the Minnesota Supreme Court relied on *Jones*, stating that "this case is quite similar to *Jones*"

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[11] *See also Rawlings v. Kentucky*, 448 U.S. at 112 (Blackmun, J., concurring) ("In my view, the 'right to exclude' often may be a principal determinant in the establishment of a legitimate Fourth Amendment interest.").

(J.A.21). At first glance this case and *Jones* seem factually similar: Respondent and Jones were both overnight guests who carried with them only a change of clothes. There are, however, important factual differences between this case and *Jones* which the Minnesota Supreme Court overlooked. These factual differences demonstrate that Respondent had far less control over his friend's home than did Jones:

a) Respondent was never left alone in the duplex. The record indicates that he left the duplex when the other occupants of the dwelling left. He returned only when they returned.

b) Respondent presented no evidence that he had the right to refuse entry to others, and the evidence with respect to admitting entry to others was qualified and vague (*See* R.192).[12]

c) Respondent presented no evidence that he had a key to the duplex, a fact which is extremely important, although not determinative. When a host gives his guest a key to his house, he says, in effect, "my home is your home": the guest can then come and go at will, exclude others, and completely control the premises, at least as long as the owner is absent. Because Respondent's connection with, and control of, the premises was minimal, a careful application of *Rakas* compels a finding that Respondent lacked a reasonable expectation of privacy in the duplex. The Minnesota court's holding to the contrary is

[12] The State contends that the Minnesota Supreme Court's conclusion regarding Respondent's right to admit or exclude others is clearly erroneous because it was not supported by the record. Furthermore, even if the record were subject to conflicting interpretations, it is the State's position that Respondent did not overcome his burden of proof on this issue. Concerning the Defendant's burden of proof, *see Rawlings v. Kentucky*, 448 U.S. at 104; *Rakas v. Illinois*, 439 U.S. at 130-131, n.1.

merely a restatement of the "legitimately on the premises" standard which this Court rejected in *Rakas*.[13]

2. An analysis of the totality of the circumstances, including Respondent's lack of ownership, and his lack of extensive control of the premises, demonstrates that Respondent had no reasonable expectation of privacy in the duplex.

The Fourth Amendment is designed to protect people's privacy rights in their possessions and their homes. Yet one can have a legally sufficient interest in a place other than one's own home so that the Fourth Amendment protects his privacy there. *Rakas v. Illinois*, 439 U.S. at 142. When an individual

[13] Respondent must show that he had a legitimate expectation of privacy in the area searched. This Court has not indicated, however, whether, in an arrest situation, the "area searched" is the entire premises or is limited to the immediate area in which the person was arrested. In the context of search and seizure of property, however, this Court has indicated that the defendant must show a privacy interest in the immediate area searched. *See United States v. Salvucci*, 448 U.S. at 95 (remanding to allow the defendants the opportunity to establish "that they had a legitimate expectation of privacy in the areas of [defendant's] mother's home where the goods were seized."); *Rawlings v. Kentucky*, 448 U.S. at 104 (Defendant must show he had a legitimate expectation of privacy in Cox's purse); *Rakas v. Illinois*, 439 U.S. at 148 (Defendants must show that they had "a legitimate expectation of privacy in the particular areas of the automobile searched"). This Court has also stated that "an entry to arrest and an entry to search for and to seize property implicate the same interest in preserving the privacy and the sanctity of the home, and justify the same level of constitutional protection." *Payton v. New York*, 445 U.S. at 588. If Respondent must show a privacy interest in the immediate area, his claim must fail; whatever expectation of privacy Respondent may have had in the areas he used during his overnight stay, Respondent made no showing that he had any privacy interest in the small third floor storage closet in which he was found and arrested.

is away from his home, he may treat some other place—a motel room, a room in his parents' home or in the home of a friend, for example—enough like a home that it will be deemed such for the purposes of the Fourth Amendment's protection of privacy. But his subjective expectation of privacy in a particular place is not sufficient to invoke the Fourth Amendment unless that expectation is one that society is prepared to recognize as objectively reasonable. *California v. Greenwood*, 486 U.S. ——, 108 S.Ct. 1625, 100 L.Ed.2d 30 (1988); *Rakas v. Illinois*, 439 U.S. at 143-44, n.12 ("Legitimation of expectations of privacy by law must have a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society."). *Accord Smith v. Maryland*, 442 U.S. 735, 740 (1979). This case raises the question of what facts must be present before society can reasonably find privacy expectations in a second place similar to those in one's own home. The State submits that merely sleeping overnight there is not enough to create those privacy expectations. A defendant must establish ownership or a relationship to the owner; extensive use; or some evidence of control over the premises before a legitimate expectation of privacy can be found.

In determining legitimate expectations of privacy this Court has rejected a "bright line" rule in favor of case by case analysis. *Rakas v. Illinois*, 439 U.S. at 144-48. The Court has had little opportunity, however, to set forth the factors which would help establish a legitimate expectation of privacy. Lower courts have applied several factors, but without guidance from this Court, have reached inconsistent and sometimes incongruous results. *See* State's Petition for a Writ of Certiorari, pp. 14-17 and Brief of Amici Curiae in Support of Petition for Writ of Certiorari, pp. 5-8.

The State submits that the privacy expectations of an overnight visitor are reasonable when some combination of the following independent factors are present:

a) the visitor has some property rights in the dwelling;

b) the visitor is related by blood or marriage to the owner or lessor of the dwelling;

c) the visitor receives mail at the dwelling or has his name on the door;

d) the visitor has a key to the dwelling;

e) the visitor maintains regular or continuous presence in the dwelling, especially sleeping there regularly;

f) the visitor contributes to the upkeep of the dwelling, either monetarily or otherwise;

g) the visitor has been present at the dwelling for a substantial length of time prior to arrest;

h) the visitor stores his clothes or other possessions in the dwelling;

i) the visitor has been granted by the owner exclusive use of a particular area of the dwelling;

j) the visitor has the right to exclude other persons from the dwelling;

k) the visitor is allowed to remain in the dwelling when the owner is absent;

l) the visitor has taken precautions to develop and maintain his privacy in the dwelling.

These factors reflect society's (including police officers') understanding of what makes a dwelling, even a temporary one, a "home." Some factors may be determinative in a particular case; others are not. While each case will present a different mix of factors, the ultimate question remains "whether one's claim to privacy from government intrusion is reasonable in light of all the surrounding circumstances." *Rakas v. Illinois*, 439 U.S. at 152 (Powell, J., concurring).

None of the factors enumerated above were present in the instant case, and therefore any expectation of privacy Respondent had in the Bergstroms' duplex was not reasonable.

For ten days before the crime Respondent's home was Ecker's apartment. Had police entered that home illegally, Respondent's privacy rights would have been violated. In order to elude police, however, Respondent slept one night on the floor in the home of an acquaintance. Even if police had entered that home illegally, Respondent's privacy rights were not violated because his connection to, and control of, the place was so tenuous. To hold that Respondent had no legitimate expectation of privacy in the Bergstroms' home will not destroy the privacy rights of felons in their homes. It will, however, prevent felons from using the Fourth Amendment as a shield to escape apprehension wherever they flee.

II. DEFENDANT'S WARRANTLESS ARREST WAS REASONABLE UNDER THE FOURTH AMENDMENT BECAUSE IT WAS JUSTIFIED BY EXIGENT CIRCUMSTANCES.

This case presents the following questions:

a) whether, under the exigent circumstances exception to the warrant requirement, police may make a warrantless entry of a dwelling to arrest a defendant who police have probable cause to believe is an accomplice to an armed robbery and murder, and who police believe is in hiding and may be preparing to flee; and

b) if so, whether the exigency justifying immediate entry is destroyed by the officers' presumed ability to stake out the defendant's home while obtaining a warrant. These questions, part of the broader issue of how to define the exigent circumstances necessary to justify a warrantless police entry of a

home to make an arrest, have not yet been decided by this Court.

The Minnesota Supreme Court held that Respondent's warrantless arrest was not justified by exigent circumstances because: 1) Respondent was not the murderer but rather his accomplice; 2) the police had no reason to believe Respondent was armed since they had already recovered the murder weapon; 3) Respondent had not yet left town; and 4) the police could have obtained a warrant, either during the hour while they waited for Respondent's return to the duplex or while they had the house surrounded (J.A.22-25). The Minnesota court specifically held that exigent circumstances did not exist to justify Respondent's warrantless arrest because officers could have continued to stake out the house while trying to obtain a warrant (J.A.23-25). The Minnesota court's decision is based on faulty reasoning and is wrong as a matter of public policy.

The State contends that where, as in this case, police have probable cause to believe that a suspect committed a felony and also have probable cause to believe the suspect will be located in a particular home, they can arrest the suspect there without a warrant if they have specific and articulable facts that a delay to get a warrant will gravely endanger police officers or other persons and will result in the escape of the suspect. When these facts are present, the police need not stake out the suspect's home while obtaining a warrant. Such a holding appropriately balances Fourth Amendment privacy rights against the need for effective law enforcement and protection of the public; it is therefore consistent with existing Fourth Amendment law. Moreover, it is a common sense approach to warrantless home entries which is easily understood and applied by police officers in the field.

A. Police May Make a Warrantless Entry to Arrest When They Can Demonstrate an Urgent Need to Do So.

The Fourth Amendment proscribes "unreasonable" searches and seizures. In order to assess the reasonableness of a search or seizure, this Court has balanced the governmental interest which allegedly justifies official intrusion against the invasion of privacy that the search or seizure entails. *Terry v. Ohio*, 392 U.S. 1, 21 (1968). Because of the sanctity of the home, warrantless searches and seizures within the home, absent probable cause and exigent circumstances, are presumptively unreasonable. *Payton v. New York*, 445 U.S. 573 (1980). The Court in *Payton* declined to decide what type of emergency or "exigent circumstances" would justify a warrantless home entry to arrest or search. *Id.* at 583. Although the police bear a heavy burden when attempting to demonstrate an urgent need that might justify warrantless searches or arrests, *Welsh v. Wisconsin*, 466 U.S. 740, 749-50 (1984), this Court has recognized several such emergency conditions. *See, e.g. Mincey v. Arizona*, 437 U.S. 385 (1978) (search of homicide scene for victims and the killer); *Michigan v. Tyler*, 436 U.S. 499 (1978) (ongoing fire); *United States v. Santana*, 427 U.S. 38 (1976) (hot pursuit of a fleeing felon); *Warden v. Hayden*, 387 U.S. 294 (1967) (hot pursuit of fleeing felon and possibility of violence to police and others); *Schmerber v. California*, 384 U.S. 757 (1966) (destruction of evidence); *Ker v. California*, 374 U.S. 23 (1963) (potential for flight of felon and destruction of evidence). In short, "a warrantless entry by criminal law enforcement officials may be legal when there is compelling need for official action and no time to secure a warrant." *Michigan v. Tyler*, 436 U.S. at 509.

B. Respondent's Warrantless Arrest Was Justified Because Police Had Reason to Believe Delay to Obtain a Warrant Would Have Endangered Police Officers and Resulted in Respondent's Escape.

This Court has not specifically decided whether the possibility of flight of a felon believed to be dangerous is an exigent circumstance justifying a warrantless arrest.[14] From the point of view of the police officer in the field, the necessity for quick action under these circumstances is as great as in the true "hot pursuit" situation: if arrest were delayed, a dangerous felon could well destroy evidence, go into hiding, commit more crimes, or harm police officers or others. Delay may well allow the felon to contemplate and prepare an armed confrontation with police or the taking of a hostage. (This danger to the police and the public is discussed more fully at pp. 31-34, *infra*.) Prompt action is even more imperative where, as in this case, the suspect is already in hiding because of the suspect's mobility; in many cases once the tip as to the suspect's whereabouts gets cold, so does the police investigation.

The following facts demonstrate the reasonableness of the police action in this case:

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[14] Lower courts have generally found that the possibility of a dangerous felon's escape or the possibility of violence are exigent circumstances making a warrantless arrest reasonable. *See, e.g. United States v. Cattouse*, 846 F.2d 144 (2d Cir. 1988); *United States v. Davis*, 785 F.2d 610 (8th Cir. 1986); *United States v. Salvador*, 740 F.2d 752 (9th Cir. 1984), *cert. denied*, 469 U.S. 1196 (1985); *United States v. Acevedo*, 627 F.2d 68 (7th Cir. 1980); *United States v. Campbell*, 581 F.2d 22 (2d Cir. 1978); *United States v. Flickinger*, 573 F.2d 1349 (9th Cir. 1978); *United States v. Donaldson*, 606 F. Supp. 325 (D. Conn. 1985); *Gaylor v. State*, 284 Ark. 215, 681 S.W.2d 348 (1984); *State v. Chavez*, 98 N.M. 61, 644 P.2d 1050 (1982); *Weddle v. State*, 621 P.2d 231 (Wyo. 1980); *State v. Elderts*, 62 Hawaii 495, 617 P.2d 89 (1980); *People v. Abney*, 81 Ill.2d 159, 407 N.E.2d 543 (1980).

1) The offense involved was murder, the gravest possible offense. In *Welsh v. Wisconsin*, 466 U.S. at 753, this Court held that the gravity of the underlying offense is an extremely important factor to be considered in deciding whether exigent circumstances exist.

2) Respondent was a dangerous felon, despite the fact that he was not the one who pulled the trigger. The police suspected Ecker of committing a series of armed robberies. They had probable cause to believe that Respondent aided Ecker in the commission of this robbery/murder. Their experience in the field led them to believe that Respondent probably also participated in the planning of the offense. To the extent that the co-defendant approves of, and assists in, the commission of a serious, violent offense, a policeman in the field is justified in believing the co-defendant to be just as dangerous as the one who pulled the trigger. Of course, each co-defendant is criminally liable for all of the criminal acts committed during the crime. *See, e.g.* Minn. Stat. §609.05 (1987).

3) The police had reason to believe Respondent might be armed even though the weapon used by co-defendant Ecker was recovered. Belief that Respondent might be armed was reasonable for the following reasons: a) found in Respondent's car were the murder weapon and two empty shoulder holsters for handguns, as well as a pellet gun and a knife; b) Respondent had ample opportunity after his escape from police to obtain a firearm; and c) the offense which Respondent helped commit was armed robbery and murder. The reasonableness of the officer's determination of exigent circumstances, like his determination of probable cause, depends on the information available to him at the time the decision to proceed is made. *Texas v. Brown*, 460 U.S. 730, 742 (1983). That no gun was found at Respondent's arrest does not, therefore, make the officer's belief that he was armed unreasonable.

4) The police had reason to believe Respondent may be preparing to flee, supported by the following facts: a) Respondent had successfully fled police once and was in hiding; b) police had received information that he might flee again; c) Respondent's statement to Julie Bergstrom, "tell them I left," could be reasonably construed by officers as a statement of Respondent's present intent to flee at that moment; and d) the seriousness of the offense and the fact that the Respondent was aware that the co-defendant had been arrested makes flight more likely. *See Welsh v. Wisconsin*, 466 U.S. at 759 (White, J., dissenting) ("The seriousness of the offense with which a suspect may be charged also bears on the likelihood that he will flee and escape apprehension if not arrested immediately.").

5) Although there is no evidence in the record to indicate how long it would have taken police to obtain an arrest warrant,[15] it is clear that a warrant could not have been

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[15] Following is the sole evidence as to this point in the record:

Q. [By defense counsel]: Officer, I assume in the course of your twenty years as a police officer you have secured arrest warrants and arrested individuals based on warrants, is that correct?

A. [By Sergeant DeConcini]: Yes, I have.

Q. And you are aware that when this process is followed that a judge actually has to physically review the warrant and determine if it's proper to arrest somebody, is that correct?

A. That is correct.

Q. And approximately how long—if there is some urgency involved, the process can be expedited, can't it?

A. Yes and no.

Q. Well, you could secure one within a couple hours under normal circumstances, couldn't you?

A. Under normal circumstances, Monday through Friday, from 8:00 a.m. to 4:00 p.m., yes.

Q. Have you ever secured an arrest warrant on a weekend?

A. No.

Q. Have you ever tried?

A. No.

(R.129-30).

obtained quickly, and certainly not before Respondent returned to the duplex. An arrest warrant in Minnesota, unlike a search warrant, must be combined with a criminal complaint, which requires the signature and approval of both a county attorney and a judge. Therefore, in addition to locating a judge, police must locate a county attorney, who must then review all the police reports, decide whether to issue the murder complaint, and have the documents typed and filed. This process takes substantial time during the work week; when the complaint is sought on the weekend the time required is greater still.[16]

Police had probable cause to believe that Respondent had participated in a violent felony using a firearm. They believed he might be armed. They believed he was hiding from police and was preparing to flee. They also had probable cause to believe he was in the duplex. Under these circumstances, warrantless entry to arrest was justified by the probability that the substantial delay involved in getting an arrest warrant would result in Respondent's escape and the endangerment of police officers and others.[17]

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[16] The State submits that whether exigent circumstances exist should not depend on the time required to obtain a warrant. An emergency is an emergency, regardless of the time needed to obtain a warrant.

[17] It could be argued that the police could have avoided a warrantless home entry by waiting outside the duplex in an unmarked squad car and arresting Respondent outside the home when he returned. However, since police believed Respondent was armed, such a plan posed a grave risk of danger to police and neighbors if a shootout on the street of a residential neighborhood ensued. Moreover, the risk of Respondent's escape under that plan was great since Respondent had, only the day before, demonstrated an ability to outrun several police officers. These risks could not be eliminated; dispatching a large number of policemen to the area might minimize the risk, but such a move would greatly deplete police resources and might just as likely escalate possible violence or prevent Respondent's return altogether.

C. Under the *Dorman* Analysis, Respondent's Warrantless Arrest was Proper; the *Dorman* Analysis, However, Should be Rejected by this Court.

Many lower courts, including the Minnesota Supreme Court, use the so-called *Dorman* factors, either exclusively or as part of a flexible "totality of the circumstances" test, in determining whether exigent circumstances exist to justify a warrantless arrest. These factors, enumerated in *Dorman v. United States*, 435 F.2d 385, 392-93 (D.C.Cir. 1970), include the following: a) the gravity of the offense and whether the crime was a violent one; b) whether the suspect is believed to be armed; c) whether there is a clear showing of probable cause to believe the suspect committed the crime; d) whether the police have strong reason to believe that the suspect is in the premises being entered; e) whether there is a likelihood the suspect will escape if not swiftly apprehended; and f) whether the entry to arrest was peaceful. This Court has declined to approve or disapprove of the *Dorman* analysis, except to adopt the first factor, the gravity of the offense, as important in determining exigent circumstances. *Welsh v. Wisconsin*, 466 U.S. at 751-752. The *Dorman* analysis has been widely criticized as being impractical, inflexible and outdated. *See, e.g.*, 2 W.LaFave *Search and Seizure* §6.1(f) 595, 599-600 (2d ed. 1987); Baldassano, *Police Created Exigencies: Implications for the Fourth Amendment*, 37 Syracuse L.Rev. 147, 154-156 (1986); Harbaugh & Faust, *"Knock on any Door"—Home Arrests After Payton and Steagald*, 86 Dick L.Rev. 191, 224-25 (1982); *Note, Exigent Circumstances for Warrantless Home Arrests*, 23 Ariz. L.Rev. 1171, 1173-75 (1981).

Application of the *Dorman* analysis to the facts of this case compels a finding of exigent circumstances: The crime was a grave, violent one; Respondent was believed to be armed;

police had probable cause to believe Respondent committed the crime and to believe he was in the duplex; police had good reason to believe Respondent might flee; and the entry to arrest was peaceful.[18] Nevertheless, the State submits that the *Dorman* analysis should be rejected by this Court. Not only are some of the factors now invalid or obsolete,[19] but a checklist of numerous factors is virtually impossible for a police officer to evaluate on the spot. The factors can be difficult to assess individually, and the difficulty is compounded by the fact that the *Dorman* court did not indicate how the factors were to be weighed, and what the result would be if some, but not all, of the factors were present.[20] This rule does not enable well-intentioned police officers to decide quickly whether exigent circumstances exist, and is therefore unworkable.

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[18] Police knocked on the door, which was answered by Louann Bergstrom (R.184-85).

[19] The defendant in *Santana* was not armed. Nor has this Court explicitly required a higher quantum of probable cause or a peaceful entry in its cases discussing exigent circumstances.

[20] *See* 2 W.LaFave, *Search and Seizure*, §6.1(f) at 600:

> For example, take the situation presented by *United States v. Lindsay*: the court, after a careful and elaborate evaluation of "all the circumstances surrounding the entry," was able to conclude that the first, second and sixth *Dorman* factors were present, that the third and fourth factors were not present, that the arguments on both sides concerning the fifth factor were "of equal weight," and that the seventh factor was a washout (as it will ordinarily be, since it "works in more than one direction"). Even assuming the police were able to resolve each of these seven issues in a like manner while they were outside the premises, does this tell them that a warrantless entry may be made or that it may not be made? Though *Lindsay* holds that a warrantless entry is unconstitutional on such facts, it is to be doubted that an officer could have reached that conclusion with confidence on the basis of *Dorman*, just as it is to be doubted that *Lindsay* affords a basis for him to decide a case involving a somewhat different mix of factors [footnotes omitted].

A judicial application of the *Dorman* "rule" will, in general, result in a finding of exigency where police have probable cause, knowledge of the suspect's whereabouts, and facts indicating that the suspect is dangerous and about to flee. Restating the *Dorman* rule in this simpler way eliminates the need for lengthy discussion and weighing of numerous factors, while yet retaining *Dorman's* essential requirements. The requirements that remain after this distillation of the *Dorman* rule involve judgments that police officers are forced to make daily. Therefore, officers can apply the distilled rule more quickly and more consistently than the original rule.

D. Under the Circumstances of this Case Police Were not Required to Stake Out the Duplex While Seeking a Warrant.

The Minnesota Supreme Court held that the warrantless arrest was unconstitutional because the officers had surrounded the duplex and could have continued to stake out the house while trying to obtain a warrant. The court's holding is contrary to public safety and common sense. The court's assertion ignores the reality that to maintain surveillance of the "hideout" of a felon connected with an armed robbery and murder is extremely dangerous to the police, to the defendant, to the other occupants of the house, and to the public at large. Had the police maintained a stakeout at the duplex for the several hours required to obtain a murder complaint (or even a search warrant), Respondent, who knew he was involved in a robbery/murder, and that police were outside, may well have become desperate to escape. The stakeout would give him time to explore his options, including an armed shootout with the police or the taking of a hostage from within. A desperate Respondent may well have turned on his acquaintances, decid-

ing perhaps that one of the Bergstroms must have reported his whereabouts to police. Meanwhile, the presence of numerous squad cars in a populated area not only disrupts local activities, but may well draw curious bystanders to the area where they could be harmed by the defendant's likely resistance to arrest. "The Fourth Amendment does not require police officers to delay in the course of an investigation if to do so would gravely endanger their lives or the lives of others," *Warden v. Hayden*, 387 U.S. 294, 298-99 (1967).

Moreover, stakeouts are not always effective in preventing escape. For examples of stakeouts that did not work, *see United States v. Cattouse*, 846 F.2d 144, 147-48 (2d Cir. 1988); *United States v. Donaldson*, 606 F.Supp. 325, 332 (D. Conn. 1985).

For these reasons several lower courts have held that a police stakeout is not required under facts similar to those in the instant case. *See United States v. Salvador*, 740 F.2d 752 (9th Cir. 1984), *cert. denied* 469 U.S. 1196 (1985); *United States v. Webster*, 750 F.2d 307 (5th Cir. 1984); *United States v. Williams*, 612 F.2d 735, 739 (3rd Cir. 1979), *cert. denied* 445 U.S. 934 (1980) ("[A]n immediate response by entry was necessary to prevent the occurrence of contingencies which would have made appellant's capture alive and without harm to the police or others impossible, or at least, unlikely; i.e., that appellant would barricade himself in the residence and engage in a shootout or attempt an armed escape with or without hostages."); *United States v. Campbell*, 581 F.2d 22 (2nd Cir. 1978); *United States v. Brightwell*, 563 F.2d 569 (3rd Cir. 1977), *cert. denied* 439 U.S. 849 (1978); *United States v. McLaughlin*, 525 F.2d 517, 521 (9th Cir. 1975), *cert. denied*, 427 U.S. 904 (1976) ("The officers . . . could take their chances with respect to the destruction of the evidence, obtain reinforcements, and settle in for several hours of siege while awaiting the arrival of the warrant, or move quickly to arrest the occupants and to secure the premises and the evidence while awaiting the arrival of the warrant. We cannot accept the view that the Fourth Amendment requires that the officers pursue the former course. To do so would ignore the legitimate interests of the neighbors whose surroundings should not be impressed with a state of siege, innocent persons who might be injured accidentally as a consequence of a large number of armed and mobile men, and the interest of the general public in efficient law enforcement and certain punishment for wrongdoers."); *United States v. Shye*, 492 F.2d 886, 892 (6th Cir. 1974) ("Although there was little likelihood of escape, due to the presence of so many officers, there was, nevertheless, a substantial likelihood of bloodshed or an impending siege if quick action were not taken."); *State v. Girard*, 276 Or. 511, 515, 555 P.2d 445, 447 (1976) ("Defendant argued that the two officers could have 'surrounded' the house to avoid escape while they waited for reinforcements. That involves a large measure of speculation, depending upon a variety of factors relating to the feasibility of 'surrounding' the house or otherwise preventing escape, including the size of the house, the number of exits, the proximity of the house to cover for a person bent on escape, visibility, etc. In the exigencies of the moment, the officers could not reasonably be expected to put fine weights in the scale in weighing the chances of securing the house or of losing their quarry.") *See also* 2 W. LaFave, *Search and Seizure*, § 6.1(f), at 605-06 ("Not infrequently, a prompt entry to arrest is called for in order to minimize the risk that someone will be injured or killed. Sometimes the risk is to another person who is also in the premises to be entered, such as an undercover agent or informant, a possible hostage, or an individual the person to be arrested knows has cooperated with the

police. Delay may also increase the risk of harm to persons outside the premises. The passage of time may enhance the ability of those inside to make an effective forcible resistance when the police ultimately make their entry to arrest. And if the police are required to stake out the premises while a warrant is obtained, this may cause curious bystanders to gather in the immediate vicinity, where they might well be harmed in the event of forcible resistance to the police entry.").[21]

It has been suggested that the question of whether or not the police must stake out the premises to obtain a warrant should depend on whether the arrest was planned in advance, in which case a warrant is required unless exigent circumstances exist before police go out into the field; or whether it was made in the course of an ongoing investigation in the field, in which case a warrantless arrest is presumptively legal. 2 W.LaFave, *Search and Seizure* §6.1(f) at 600-602. The Minnesota Supreme Court, relying on this distinction, characterized the arrest as "planned" because police made a decision to arrest Respondent when he returned to the duplex, and no warrant was sought during the 45 minutes between that decision and the actual arrest. Respondent's arrest, however, was not a truly "planned" arrest, where police, after completing their field investigation, decide to arrest the defendant hours, days or weeks later at some convenient time. (*See, e.g.*, the facts surrounding the arrests of Payton and

[21] *But cf. United States v. Patino*, 830 F.2d 1413 (7th Cir. 1987); *United States v. Alvarez*, 810 F.2d 879 (9th Cir. 1987); *United States v. Adams*, 621 F.2d 41 (1st Cir. 1980); *People v. Atkinson*, 116 Misc.2d 771, 456 N.Y.2d 328 (1982); and *State v. Peller*, 287 Or. 255, 598 P.2d 684 (1979) (Courts decide warrantless entry was not justified by exigent circumstances under facts of case; courts suggest that police should have staked out the premises until a warrant could be obtained).

Riddick in *Payton v. New York*, 445 U.S. 573 (1980).) Respondent's arrest was the culmination of an ongoing, continuous field investigation into the identity and present location of Ecker's co-defendant. At 2:00 p.m. Sergeant DeConcini received the information corroborating the informant's tip. He then believed that Respondent was probably Ecker's co-defendant and that he may be returning to the duplex. At that time Sergeant DeConcini felt he had probable cause to arrest Respondent, and he issued the "pickup order." He did not "plan" to arrest Respondent at the duplex; while he may have hoped to arrest Respondent soon at that address, Sergeant DeConcini did not know for certain whether, and when, Respondent would return to the duplex. When Sergeant DeConcini issued his "pickup order," he intended to arrest Respondent wherever he could be found—on the street, in the bus depot, at the duplex, or someplace else. A warrant was not required to arrest Respondent on the street or in the bus depot or other public place, *United States v. Watson*, 423 U.S. 411 (1976); only if Respondent were found in a private home might a warrant be necessary.[22] Sergeant DeConcini did not obtain a warrant to cover this possibility because he knew a great deal of time would be required to obtain one and he believed he was faced with an emergency situation: the necessity of arresting a felon who was involved in a murder and was in hiding, before he could flee the city or harm anyone else.

Moreover, even if exigent circumstances did not exist before police surrounded the duplex, the necessity for quick police action arose after police arrived at the home. An exigency requiring police action may arise at any time after probable

[22] Sergeant DeConcini did not believe that Respondent had any privacy expectations in the Bergstroms' home; all the facts he possessed indicated otherwise.

cause is established. *See Cardwell v. Lewis*, 417 U.S. 583, 595-96 (1974) ("Assuming that probable cause previously existed, we know of no case or principle that suggests that the right to search on probable cause and the reasonableness of seizing a car under exigent circumstances are foreclosed if a warrant was not obtained at the first practicable moment. . . . The exigency may arise at any time, and the fact that the police might have obtained a warrant earlier does not negate the possibility of a current situation's necessitating prompt police action.") Before entering the duplex, police telephoned and asked Respondent to come out; by doing so police were able both to confirm that Respondent was in the duplex and to give Respondent an opportunity to come out of the duplex, either to give himself up peaceably or to further the police investigation by explaining his innocence. However, when police heard a male, presumably Respondent, instruct "Julie" to "tell them I left," police could reasonably have decided that Respondent intended to flee; under the facts of this case, police were then justified in entering immediately to prevent Respondent's escape.

This case clearly demonstrates many of the difficulties faced by police officers in the field, which were described by Justice White in his dissenting opinion in *Payton v. New York*, 445 U.S. at 618-619:

> The policeman on his beat must now make subtle discriminations that perplex even judges in their chambers. As Mr. Justice Powell noted, concurring in *United States v. Watson*, *supra*, police will sometimes delay making an arrest, even after probable cause is established, in order to be sure that they have enough evidence to convict. Then, if they suddenly have to arrest, they run the risk that the subsequent exigency will not excuse their prior

failure to obtain a warrant. This problem cannot effectively be cured by obtaining a warrant as soon as probable cause is established because of the chance that the warrant will go stale before the arrest is made.

Further, police officers will often face the difficult task of deciding whether the circumstances are sufficiently exigent to justify their entry to arrest without a warrant. This is a decision that must be made quickly in the most trying of circumstances. If the officers mistakenly decide that the circumstances are exigent, the arrest will be invalid and any evidence seized incident to the arrest or in plain view will be excluded at trial. On the other hand, if the officers mistakenly determine that exigent circumstances are lacking, they may refrain from making the arrest, thus creating the possibility that a dangerous criminal will escape into the community. The police could reduce the likelihood of escape by staking out all possible exits until the circumstances become clearly exigent or a warrant is obtained. But the costs of such a stakeout seem excessive in an era of rising crime and scarce police resources.

The primary reason for the warrant requirement is to interpose a "neutral and detached magistrate" between the citizen and the possibly overzealous police officer. But when, as in this case, the officer faces an emergency requiring immediate action to prevent possible death or injury, the warrant requirement must yield. To hold otherwise is to tilt the equilibrium between privacy rights and public safety.

CONCLUSION

The judgment of the Minnesota Supreme Court should be reversed.

Respectfully submitted,

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